United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2010

ORIGINAL

B
P/S.

No. 74-2010

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES L. JASON,

Petitioner,

v.

HON. ALBERT W. COFFRIN,

Respondent.

PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES L. JASON, Petitioner, v. HON. ALBERT W. COFFRIN, Respondent.	No. 74-2010

PETITION FOR REHEARING

James L. Jason, by his undersigned counsel, petitions this Court pursuant to Federal Rule of Appellate Procedure 40 for rehearing of its Order of August 16, 1974 denying his Petition for a Writ of Mandamus. Petitioner also respectfully suggests, pursuant to Federal Rule of Appellate Procedure 35(b), the appropriateness of a hearing en banc of the issues tendered by his Petition.

The ground of this Petition is that the Court "has overlooked or misapprehended" certain "points of law or fact." Specifically, the questions presented by the Petition assumed a greatly enhanced significance on August 19, 1974 due to remarks of the President of the United States, and the revelation that the Attorney General of the United States, in consultations with the Secretary of Defense, will in the near future advise

the President to the end that a consistent policy be adopted in cases like petitioner's.

The Petition for Writ of Mandamus presented the issue whether the federal judicial power might be invoked to determine the lawfulness or unlawfulness of petitioner's induction order. The Petition stated that this case is one of many. Here are the President's words discussing these cases in Chicago on August 19.[1/]

> "Unlike my last two predecessors, I did not enter this office facing the terrible decisions of a foreign war, but like President Truman and President Lincoln before him, I found on my desk where the buck stops, the urgent problem of how to bind up the Nation's wounds. And I intend to do that.
>
> "As a lawyer, I believe our American system of justice is fundamentally sound. As President, I will work within it. As a former Naval reservist, I believe our system of military justice is fundamentally sound. As Commander-in-Chief, I will work within it.
>
> "As a former Congressman who championed it, I believe the concept of an all-volunteer armed force is fundamentally sound, and will work much better than peacetime conscription.
>
> "Accordingly, in my first week at the White House, I requested the Attorney General of the United States and the Secretary of Defense to report to me personally before September 1 on the status of some 50,000 of our countrymen convicted, charged or under investigation or still sought for violations of Selective Service or the Uniform Code of Military Justice, offenses loosely described as desertion and draft-dodging.

1/ The full text of the President's remarks is attached hereto as Appendix A.

"These two Cabinet officers are to consult with other Government officials concerned and communicate me their unvarnished views and those of the full spectrum of American opinion on this controversial question, consolidating the known facts and legal precedents.

"I will then decide how best to deal with the different kinds of cases, and there are differences. Decisions of my Administration will make any future penalties fit the seriousness of the individual's mistake.

"Only a fraction of such cases I find in a quick review relate directly to Vietnam, from which the last American combatant was withdrawn over a year ago by President Nixon.

"But all, in a sense, are casualties, still abroad or absent without leave from the real America.

"I want them to come home if they want to work their way back.

"One of the last of my official duties as Vice President, perhaps the hardest of all, was to present posthumously 14 Congressional Medals of Honor to the parents, widows and children of fallen Vietnam heroes.

"As I studied their records of supreme sacrifice, I kept thinking how young they were. The few citizens of our country who, in my judgment, committed the supreme folly of shirking their duty at the expense of others, were also very young."

If it is indeed to be national prosecutorial policy to "make any future penalties fit the seriousness of the individual's mistake," the Attorney General may well decide to consent to the sort of hearing sought in the respondent's court by the petitioner. Such a hearing would provide the only means of review by an Article III court as to whether the "individual"

or his government made a "mistake". If, as Justice Douglas indicated in Hughes v. Thompson, the power to grant the relief requested by petitioner is possessed by the respondent court,[2] an expression of view of the Attorney General as to whether that discretion ought to be exercised is obviously relevant and is now, by the President's remarks of August 19, affirmatively mandated.[3]

The principal reason for this Petition is to suggest that the Court solicit the views of the Attorney General of the United States on the issues tendered by this case. From the President's words, we have reason to hope that government lawyers in cases like petitioner's will be seeking to design de novo a truly fair procedure, rather than "with awful consistence . . . to demonstrate that a procedure already set is really legitimate." F. Newman, The Process of Prescribing "Due Process", 49 Calif. L. Rev. 215, n. 244 at 235 (1961).[4]

2/ A copy of Justice Douglas' opinion is annexed as Appendix B. A copy of Judge Thompson's Order dismissing the indictment in the Hughes case under Fed. R. Crim. P. 12 is attached as Appendix C.

3/ The Attorney General may conclude that petitioner's position --that the District Court had not only the power but the duty to hear the motion filed below--is correct.

4/ On the role of the Department of Justice in insuring a consistent governmental position on important questions, see 28 U.S.C. §§ 503, 505, 516-19; K. Werdegar, The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy, 36 Geo. Wash. L. Rev. 481 (1968).

Petitioner sought here and in the court below to invoke a settled process of law. That process, as Justice Jackson once observed,

> "[I]s not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice." Shaughnessy v. United States, ex rel. Mezei, 345 U.S. 206, 224-25 (1953) (dissenting opinion).

It is respectfully suggested that the President's words, promising review of petitioner's plight, counsel also that this Court require a statement of position by the Attorney General.

For that reason, it is respectfully requested that this Petition for Rehearing be granted or, in the alternative, that an active judge of this Circuit request a poll on rehearing en banc; and that in either case this Court request the expression of views contemplated by Federal Rule of Appellate Procedure 21(b).

Respectfully submitted,

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August 21, 1974

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Rehearing were served upon each of the following by First Class Mail this 21st day of August, 1974:

Honorable Albert W. Coffrin
United States District Court
for the District of Vermont
Burlington, Vermont 05401

United States Attorney
Federal Building
Rutland, Vermont 05701

Michael E. Tigar

APPENDIX A

FOR IMMEDIATE RELEASE AUGUST 19, 1974

OFFICE OF THE WHITE HOUSE PRESS SECRETARY
(Chicago, Illinois)

THE WHITE HOUSE

ADDRESS BY THE PRESIDENT
TO THE 75TH CONVENTION
OF THE VETERANS OF FOREIGN WARS

CONRAD HILTON HOTEL

11:38 A.M. CDT

Commander Ray Soden, Governor Walker, my former members or former colleagues of the United States Congress, my fellow members of the Veterans of Foreign Wars:

Let me express my deepest gratitude for your extremely warm welcome and may I say to Mayor Daley, and to all the wonderful people of Chicago who have done an unbelievable job in welcoming Betty and myself to Chicago, we are most grateful.

I have a sneaking suspicion that Mayor Daley and the people of Chicago knew that Betty was born in Chicago. Needless to say, I deeply appreciate your medal and the citation on my first trip out of Washington as your President. I hope that in the months ahead I can justify your faith in making the citation and the award available to me.

It is good to be back in Chicago among people from all parts of our great Nation to take part in this 75th Annual convention of the Veterans of Foreign Wars.

As a proud member of Old Kent Post VFW 830, let me talk today about some of the work facing veterans -- and all Americans -- the issues of world peace and national unity.

Speaking of national unity, let me quickly point out that I am also a proud member of the American Legion and the AMVETS.

In a more somber note, this morning we all heard the tragic news of the killing of our American Ambassador to Cyprus. He, too, gave his life in foreign wars. Let us offer our prayers and our condolences to his loved ones for his supreme sacrifice on behalf of all Americans.

As President and as a veteran, I want good relations with all veterans. We all proudly wore the same Nation's uniform and patriotically saluted the same flag. During my Administration, the door of my office will be open to veterans just as it was all my 25 years as a Member of the Congress.

MORE

(OVER)

Today, I am happy to announce my intention to send the Senate the nomination of my personal friend and former Congressional colleague Dick Roudebush of Indiana -- it seems to me you know what I am going to say (Laughter) but I will finish the sentence -- to be Administrator of the Veterans Administration.

As past National Commander of the VFW, Roudy has served well as Deputy Administrator of the VA. He is a man who gets things done, and I am confident will do a first-class job.

It seems to me that we should recognize the veteran is a human being, not just a "C" number to be processed by a computer system. We all know that the Government knew our name when we were called into service. This Administration is going to see to it that we still know your name and your problems.

A veteran is a person, not just a digit in a computer system, which more often than not goofs up.

I propose the VA take the best of our technology and the very best of our human capabilities and combine them. As President, I want no arrogance or indifference to any individual, veteran or not. Our Government's machinery exists to serve people, not to frustrate or humiliate them.

I don't like red tape. As a matter of fact, I don't like any kind of tapes.

Our great veterans hospitals, which will not lose their identity, must be the very best that medical skill and dedication can create. VA hospitals have made many great medical breakthroughs in the past. One of America's great challenges today is the older veteran. The VA medical and nursing care system for older people must become a showcase for the entire Nation.

We can work together to achieve that end and humanize the VA. But to achieve such progress, I intend to improve the management of the VA. We must get the most for our tax dollars.

While supporting the new Administrator in maximum efforts to make the best use of funds available, I want Roudy to take a constructive new look at the VA's structure and the services that it renders to our veterans.

MORE

I think it is about time that we should stop thinking of veterans in terms of different wars. Some may march at a different pace than others. But we all march to the same drummer in the service of our Nation. I salute the men of many campaigns -- of World War I, World War II, Korea, and Vietnam.

As Minority Leader of the House and recently as Vice President, I stated my strong conviction that unconditional blanket amnesty for anyone who illegally evaded or fled military service is wrong. It is wrong.

Yet, in my first words as President of all the people, I acknowledged a Power higher than the people who commands not only righteousness, but love, not only justice, but mercy.

Unlike my last two predecessors, I did not enter this office facing the terrible decisions of a foreign war, but like President Truman and President Lincoln before him, I found on my desk where the buck stops, the urgent problem of how to bind up the Nation's wounds. And I intend to do that.

As a lawyer, I believe our American system of justice is fundamentally sound. As President, I will work within it. As a former Naval reservist, I believe our system of military justice is fundamentally sound. As Commander-in-Chief, I will work within it.

As a former Congressman who championed it, I believe the concept of an all-volunteer armed force is fundamentally sound, and will work much better than peacetime conscription.

Accordingly, in my first week at the White House, I requested the Attorney General of the United States and the Secretary of Defense to report to me personally before September 1 on the status of some 50,000 of our countrymen convicted, charged or under investigation or still sought for violations of Selective Service or the Uniform Code of Military Justice, offenses loosely described as desertion and draft-dodging.

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One of the last of my official duties as Vice President, perhaps the hardest of all, was to present posthumously 14 Congressional Medals of Honor to the parents, widows and children of fallen Vietnam heroes.

As I studied their records of supreme sacrifice, I kept thinking how young they were. The few citizens of our country who, in my judgment, committed the supreme folly of shirking their duty at the expense of others, were also very young.

MORE

All of us who served in one war or another know very well that all wars are the glory and the agony of the young. In my judgment, these young Americans should have a second chance to contribute their fair share to the rebuilding of peace among ourselves and with all nations.

So, I am throwing the weight of my Presidency into the scales of justice on the side of leniency. I foresee their earned re-entry -- earned re-entry into a new atmosphere of hope, hard work and mutual trust.

I will act promptly, fairly and very firmly in the same spirit that guided Abraham Lincoln and Harry Truman, as I reject amnesty, so I reject revenge. As men and women whose patriotism has been tested and proved, and yours has, I want your help and understanding.

I ask all Americans, whoever asked for goodness and mercy in their lives, whoever sought forgiveness for their trespasses, to join in rehabilitating all the casualties of the tragic conflict of the past.

Naturally, I am glad to see the VFW at this convention install a veteran of the Korean War, John Stang, as your new National Commander-in-Chief. And I compliment you and congratulate you as well as John.

We have struggled for years in America to overcome discrimination against younger Americans, against older Americans, against Americans of various creeds, religions, races, and yes, against women. I will not tolerate any discrimination against veterans, especially those who served honorably in the war in Vietnam.

I am deeply concerned about employment opportunities for the Vietnam-era veterans. We have had some success in placing veterans in the age span of 20 to 34, but the facts and figures show us that there are some tough problems in this category.

As of last month, the rate of unemployment for veterans between 20 and 24 was nearly 10 percent, much too high. The rate of unemployment for these young veterans who are members of minority groups was 19 percent, and far, far too many disabled veterans are still without jobs.

I can assure you, without hesitation or reservation, that this Administration puts a very high priority on aiding the men who bore the brunt of battle, if we can send men thousands and thousands of miles from home to fight in the rice paddies, certainly we can send them back to school and better jobs at home.

MORE

I am consequently considering the veterans education bill in this light. But your Government, of necessity, has to be constrained by other considerations as well. We are all soldiers in a war against brutal inflation.

The veterans education bill more than likely will come before me very shortly for action. It comes when I am working hard along with others from the Congress, labor, management, and otherwise, on a nonpartisan battle against excessive Government spending.

America today is fighting for its economic life. The facts are that uncontrolled inflation could destroy the fabric and the foundation of America, and I will not hesitate to veto any legislation, to try and control inflationary excesses. I am open to conciliation and compromise on the total amount authorized so that we can protect trainees and all other Americans against the rising cost of living.

I commend not only the past service of veterans but also the continuing involvement of many of you in the National Guard and reserve forces. With current manpower reductions in the active duty Army, Navy, Air Force, and Marines, the Commander-in-Chief must, of necessity, place continuing reliance on the readiness of our National Guard and reserves. And I intend to put muscle into this program.

Peace, it depends upon the strength and readiness of our defenses. And I will support every sensible measure to enhance the morale and the combat readiness of our armed forces.

The United States, our allies and our friends around the world must maintain strength and resolve. Potential adversaries obviously watch the state of our readiness and the strength of our will. I will offer them no temptations.

America is not the policeman of the world, but we continue to be the backbone of a free world collective security set-up.

MORE

Just as America will maintain its nuclear deterrent strength, we will never fall behind in negotiations to control -- and hopefully reduce -- this threat to mankind. A great nation is not only strong, but wise; not only principled, but purposeful. A fundamental purpose of our Nation must be to achieve peace through strength and meaningful negotiations.

Our good will must never be construed as a lack of will. And I know that I can count on you and the families of each and every one of you. Peace and security require preparedness and dedication.

[illegible] have experienced war firsthand. I want to make certain and positive that Washington never sends another tragic telegram. The list of mourners is already far too long. So is the list of those who wait and wonder, the families of those missing in action. I will never forget them.

Together we are going forward to tackle future problems, including the scourge of inflation which is today our Nation's public enemy number one. Our task is not easy. But I have faith in America. Through our system of democracy and free enterprise, the United States has achieved remarkable, unbelievable progress. We have shared our plenty with all mankind.

This is the same Nation that transcended inflations and recessions, slumps and booms, to move forward to even higher levels of prosperity and productivity. This is the same Nation that emerged from the smoke of Pearl Harbor on December 7, 1941, to change its own destiny and the history of the world -- and for the better.

During the first few months that I was Vice President, I traveled some 118,000 miles and visited 40 of our great States. What I saw and what I heard gave me renewed inspiration. It made me proud, proud of my country. It sustains me now.

Our great Republic is nearly 200 years old, but in many, many ways we are just getting started. Most Americans have faith in the American system. Let us now work for America in which all Americans can take an even greater pride. I am proud of America; you are proud of America, we should be proud to be Americans.

Thank you very much.

END (AT 12:05 P.M. CDT)

OPINIONS OF JUSTICES IN CHAMBERS

HOWARD R. HUGHES, Chester C. Davis, and James H. Nall

v

THE HONORABLE BRUCE R. THOMPSON, United States District Judge for the District of Nevada

— US —, 39 L Ed 2d 93, 94 S Ct —

[No. A-719]

January 25, 1974

SUMMARY

The United States District Court for the District of Nevada refused a motion to stay criminal proceedings until the court, prior to arraignment, had ruled on the accuseds' motion to dismiss the indictment for failure to state an offense and for failure to inform the accuseds of the nature of the accusation within the meaning of the Sixth Amendment. After the United States Court of Appeals for the Ninth Circuit had denied a similar motion, the accuseds filed a motion with the Circuit Justice for leave to file a petition for writ of mandamus or prohibition to compel the District Court to stay the proceedings and to rule, prior to arraignment, on the motion to dismiss the indictment.

DOUGLAS, J., as Circuit Justice, denied the motion for the reasons stated in headnote 1 below.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Mandamus § 27; Prohibition § 7 — federal criminal proceedings — consideration of motion to dismiss indictment

1. An individual justice of the United States Supreme Court, as Circuit Justice, will deny a motion for leave to file a petition for a writ of mandamus or prohibition to compel a Federal District Court to stay criminal proceedings against the petitioner and to rule, prior to arraignment, on the petitioners' motion to dismiss the indictment for failure to state an offense and for failure to inform the petitioners of the nature of the cause of the accusation within the meaning of the Sixth Amendment—the matter concerning proceedings scheduled to be heard by the District Judge in a little more than one hour, and the Circuit Justice having consulted five other Justices of the Supreme Court who were available during the court's recess, and who were also of the opinion that the motion to file should be

ANNOTATION REFERENCE

Prohibition as remedy in case of defective indictment, information, or complaint. 102 ALR 298.

denied. [Per Douglas, J., as Circuit Justice.]

Appeal and Error § 1389; Indictment, Information and Complaint § 101 — motion to dismiss indictment — consideration before arraignment

2. Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, which provides that the sufficiency of the indictment shall be noticed by the court at any time, the question whether a motion to dismiss an indictment for failure to charge an offense against the United States and failure to inform the accuseds of the nature of the cause of the accusation within the meaning of the Sixth Amendment should be disposed of prior to arraignment, rests in the sound discretion of the District Court, which has the power to follow such course; an appellate judge will direct the District Court to so exercise its discretion only in an extremely unusual case. [Per Douglas, J., as Circuit Justice.]

Criminal Law § 46 — rights of accused

3. In a criminal trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict; defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial. [Per Douglas, J., as Circuit Justice.]

OPINION

Mr. Justice Douglas, Circuit Justice.

This motion for leave to file a petition for Writ of Mandamus or Prohibition has been presented to me after a like motion was denied by the Court of Appeals on January 24, 1974. The matter concerns proceedings before the U. S. District Judge in Reno, Nevada scheduled for a hearing at 9:30 a. m. Pacific Daylight Time today, January 25, 1974; which is only a little more than an hour from the time in which I write this short opinion.

The petitioners have been indicted for alleged manipulation of the stock of an airline company prior to its acquisition about five years ago—an acquisition which was approved by the Civil Aeronautics Board. Petitioners have filed with the District Court a motion to dismiss the indictment on the grounds that it does not state facts sufficient to constitute any offense against the United States and fails to inform petitioners of the nature of the cause of the accusation within the meaning of the Sixth Amendment to the Constitution. Petitioners desire that their motion to dismiss be ruled upon prior to the arraignment. They asked the District Judge for a stay of all proceedings until the motion to dismiss the indictment was ruled upon. This stay was denied by the District Judge and as noted the Court of Appeals denied relief.

In cases such as the present one where the factor of time is all important it is customary (where possible) to consult other members of the Court before acting so that if there is a member of the Court available who feels that relief should be granted that fact can be taken into consideration. If, however, none of the Justices available feel relief should be granted then the prior consultation with those who are available is some aid to counsel seeking the relief.

[1-3] Some members of the Court are out of the city at the present time, as the Court is in recess. I have talked with five who are present and they are of the opinion that the motion to file should be denied.

That is my view. Under the Rules of Criminal Procedure the question of the sufficiency of the indictment "shall be noticed by the court at any time." Rule 12(b)(2). Whether the motion should be disposed of prior to the arraignment rests in the sound discretion of the District Court.* The District Court certainly has the power to follow that course and sometimes it may be important to prevent harassment or the use of other unconstitutional procedures against an accused. But it would take an extremely unusual case for an appellate judge to direct the District Court that he should exercise his discretion by postponing an arraignment until after the motion to dismiss the indictment has been resolved. As stated in Costello v United States, 350 US 359, 364, 100 L Ed 397, 76 S Ct 406:

> "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

Motion denied.

---

* Mandatory language directing when a motion shall be ruled upon is contained in Fed Rule Crim Proc 12(b)(4) which states that motions raising defenses or objections "shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."

APPENDIX C

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

HONORABLE BRUCE R. THOMPSON, JUDGE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD R. HUGHES,
DAVID B. CHARNAY,
CHESTER C. DAVIS,
ROBERT A. MAHEU,
JAMES H. NALL,

Defendants.

No. LV-2843-BRT

MOTIONS TO DISMISS INDICTMENT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reno, Nevada, Wednesday, January 30, 1974, 9:30 o'clock A. M.

I will just close, perhaps unnecessarily, with this statement from the Russell case:

"Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."

Counsel has frankly and with great candor said to you, in effect, "To say the least, this indictment is inept."

Now, if the Court please, if we were dealing with a traditional crime, murder or something like that, perhaps near ineptitude would not be enough; but when we are dealing with economic statutes, subtleties of regulations of economic statutes, ineptitude, I submit, is invalidity, and I submit that the Van Liew case fits this case like a glove. One can go right down through the Van Liew case and apply it.

Thank you.

MR. LIONEL: I have nothing further, your Honor.

THE COURT: This is a matter that should be handled expeditiously, for a number of reasons, one of the most important of which is that accepting the allegations of the indictment at face value, these alleged conspirators continued until April 30, 1970--although, I am not sure on just what basis that cutoff date was arrived at--Count IX

indicates possible conspiratorial participation or activity up to April 7, 1969. If the latter date is the correct date, there is a statute of limitations problem and a need for expeditious action.

Some things are not easy to say, but I think they have got to be said.

I have been practicing law in one form or another since 1936. I have defended a great many criminal cases, and for ten years I was a Federal prosecutor. In the past ten or so years, I have been a Federal Judge. And I think it should be said that in all my experience, this is the worst criminal pleading I have ever encountered.

The arguments today have made quite clear what all of us already knew, and that is that an adequate indictment has got to allege specific ultimate facts for a number of very sound constitutional reasons. One of them is that we depend upon the Grand Juries to pass upon the existence of probable cause for justification for prosecution of any offense; and it is important that every essential allegation, in order properly to charge a crime, should be included in the indictment so that we will be assured that the members of the Grand Jury had that essential fact called to their attention and were able to review in their own minds whether the evidence submitted to them established probable cause to support a prosecution.

Secondly, it is important that a defendant called into court to answer a charge be fully and adequately apprised of the nature of the charge so that he can prepare his defense.

Finally, it is important that the charge be sufficiently specific so that in the event of a future effort to prosecute one or more of the defendants on a similar charge or one arising out of the same transaction, it can be determined whether, under the Constitution, he is being placed in double jeopardy.

In my view, this indictment meets none of those tests.

I don't intend to dwell at length on all of the criticisms of the indictment that have been made by the defendants, but I would like to suggest that I accept the defendants' argument that when a conspiratorial agreement is charged, the nature of the agreement must be pleaded. It is not enough to allege that two or more persons conspired and confederated and agreed together to violate the law. It must be alleged in substance what the agreement was, and it must be apparent from the allegations whether the import of the charge is that the means used to accomplish the purposes of the conspiracy were unlawful, or that the direct objects of the conspiracy were unlawful.

I cannot read this indictment, which I have read and reread a good many times, and reach in my own mind any

idea of what the Grand Jury intended with respect to the nature and scope of the conspiratorial agreement; how or in what manner it would constitute a violation of the Federal law, or whether or not the intent is to charge a conspiracy to violate the law by unlawful means to accomplish a lawful objective, or whether the objective is itself unlawful.

Whenever a Federal statute in general terms abjures conduct which is allegedly false, fraudulent, matters of that ilk, the nature of the fraud has got to be alleged; that is to say what, if any, the wrongful representation was, whether by words or conduct, and how and in what manner it was false. Whenever a Federal statute, such as the mail fraud statute or the wire fraud statute, abjures a scheme or artifice to defraud, the nature of the scheme or artifice, like the nature of an alleged conspiratorial agreement, must be alleged in the indictment.

In order to come close to meeting those requirements, in this indictment it is necessary to use interpretation and in many instances speculation.

There has been considerable discussion about the duplicitous character of this particular indictment by virtue of the incorporation and reincorporation of Paragraphs in the various counts of the indictment. The law contemplates that separate charges against one or more defendants, arising

out of the same transaction, may be alleged in separate counts of an indictment. Each count should stand on its own, and each count should allege a separate and distinct offense, else the indictment is multiplicitous.

Incorporation by reference serves a very useful purpose when you are dealing with complicated and comprehensive transactions, such as apparently is involved in the subject matter of this particular indictment. But incorporation should be carefully used to incorporate only factual allegations from another count of the indictment; and whenever the charging allegations of one count are incorporated into the charging allegations of another count, the indictment becomes duplicitous.

Those matters of multiplicity and duplicity are sometimes not fatal, but with respect to this particular indictment, if the suggestion of the United States Attorney should be followed that all the indictment except Counts VII and VIII and Count I should be dismissed, we have not cured the more fundamental objections to the indictment which I alluded to earlier.

Of course, with respect to Counts VIII and IX, which attempt to link Mr. Hall with public offenses, if the previous counts are dismissed, they automatically fall, because they are based upon his presumed knowledge of the commission of public offenses by others, as alleged in the

earlier counts of the indictment; and if the earlier counts of the indictment don't charge public offenses, he is n alleged to have knowledge of the commission of any public offense.

I think it would be a perversion of justice to require any defendant to go to trial under this particular indictment, which has got to be interpreted in the manner most favorable to the prosecution in order for the indictment to attain the semblance of properly charging a public offense.

If there is mereit to these charges, the matter may be represented to the Grand Jury.

Also, if the Government is strongly in disagreement with the views I have expressed, it has a right to appeal.

It is the order of the Court that all the counts of the indictment and the indictment as a whole are dismissed.

The bond of Mr. Maheu is exonerated.

Do counsel have anything else they would like to bring up?

MR. HEATON: Nothing, your Honor.

THE COURT: We will be in recess.

---oOo---

UNITED STATES OF AMERICA)
) ss.
DISTRICT OF NEVADA)

I, Allan D. Bunnell, Official Reporter for the United States District Court for the District of Nevada, do hereby certify that I was present and correctly reported in Stenotype writing all the testimony and proceedings had in the above-entitled matter; that I thereafter caused my said Stenotype notes to be reduced to typewriting; that the foregoing transcript constitutes a full, true and correct transcript of the testimony and proceedings had therein.

Dated at Reno, Nevada, this 4th day of February, 1974.

Official Reporter